PROVINCIAL LEGISLATION AND THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

REPORT OF REVIEW COMMITTEE
ON
NEWFOUNDLAND LEGISLATION

Hon. Gerald R. Ottenheimer, Q.C.
Minister of Justice and Attorney General
Government of Newfoundland and Labrador

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PREFACE

The Hon. Mr. Justice Dickson in the Southam Inc. case writing the unanimous decision of the Supreme Court of Canada said:

> "The Constitution of Canada, which includes the Canadian Charter of Rights and Freedoms, is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the Constitution Act, 1982 so mandates."

The Canadian Charter of Rights and Freedoms came into force in Canada on April 17, 1982. The Charter, as it is commonly known, containing reference to fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official language rights, as well as minority language rights, forms part of the Constitution of Canada.

The Charter began a new era in Canadian law. For the first time, Canada, on April 17, 1982, had an entrenched Constitution amendable only in Canada pursuant to prescribed procedures. It guarantees the various rights referred to above which, although already recognized to a great extent, are given constitutional status with a special remedies provision.

The Charter, itself, reflects the Canadian way of compromise. It represents the culmination of numerous meetings and lengthy negotiations between federal and provincial ministers and officials. It represents the product of give-and-take, compromise and, finally, consensus.

It will be recalled that the Government of Newfoundland and Labrador played a strong role in the development of the constitutional compromise of 1981. We were a strong and early supporter of the concept of an entrenched Charter. In our constitutional white paper dated August 18, 1980 entitled Towards The Twenty First Century - Together, we stated as follows:

> " Citizens throughout Canada have traditionally enjoyed the exercise of democratic rights and fundamental freedoms. Rooted in enduring and shared ethical values, supported by the independence of the judiciary and the accountability of governments, and enshrined in the rule of law, it is unimaginable that any government in Canada would interfere with the freedom of Canadians. Yet the people of Canada - or elsewhere - live in an age of continuing, almost radical change. Today there is not the same surety as yesterday that values enshrined in the heart and conscience of a people will be universally accepted.

> The entrenchment of democratic rights and fundamental freedoms is a means of giving explicit constitutional recognition to values which have served Canada well. Newfoundland, therefore, supports a Charter of Rights which will entrench the democratic rights and fundamental freedoms of Canadians.
>
> While explicit constitutional reference will have a significant normative value, the ultimate guarantee of liberty rests with the vigilance of the citizen, the accountability of government, the independence of the judiciary and the rule of law."

The Charter affirms the new and re-affirms the old and the Government of this province recognizes that it imposes new and substantial obligations on the Government. As a result of the Charter I ordered a comprehensive review of all the laws of the province with a view to determining whether they complied with The Charter. The Government's purpose in so doing was to acknowledge the constitutional duty of Government to safeguard the entrenched rights of those subject to our provincial laws, and to live up to that duty by making sure that those provincial laws do not violate The Charter.

The review was started some time ago when I set up a committee of three lawyers, one from the civil branch and one

from the criminal branch of the Justice Department and one from the Office of the Legislative Counsel, to cause a review of all laws of the province for possible violations.

Initially, all staff lawyers in the civil division reviewed some four hundred Acts and flagged potential Charter violations. The three-person committee then examined all potential violations and analyzed them to determine whether, in their opinion, they complied with the provisions of The Charter. The review encompassed section 15 of The Charter (the equality rights provision) even though that section does not come into force until April 17, 1985.

The review has now been completed by the Committee and those provincial laws that appear to violate The Charter are set out in the attached Report. Section 33 of The Charter permits the Legislature to legislate, notwithstanding the provisions of section 2, or sections 7 to 15 of The Charter. However, the position taken by the Government of Newfoundland and Labrador is that it will not utilize this provision.

The next step in the process will be the introduction and enactment of an omnibus bill of charter-related amendments to our provincial legislation. This step will be taken in the spring of 1985, and before April 17, 1985, which is the date on which the equality rights provision of The Charter comes into force.

With some four hundred statutes having been reviewed, it is quite possible that some laws have not been highlighted in this Report even though they do not comply with The Charter. The Government is therefore anxious to receive the views of the public concerning the Committee's Report and we would encourage the review of this Report and encourage readers to advise of other changes which they think are needed to comply with The Charter.

All comments and suggestions that are received will be considered by the Government before the omnibus bill is put in its final form.

The amendment to the provincial legislation identified in this Report is an important first step for the Government. However, it will not be the final step since the Government is committed to an ongoing review of its existing laws and policies under The Charter, including subordinate legislation, and to a process of examination of new legislation, as the several provisions of The Charter are given meaning and become clearer through court cases over time.

Gerald R. Ottenheimer

Gerald R. Ottenheimer, Q.C.
MINISTER OF JUSTICE AND
ATTORNEY GENERAL

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INTRODUCTION

The Canadian Charter of Rights and Freedoms, or as it is more commonly known, The Charter, is contained in Part 1 of the Constitution Act, 1982.

Section 52(1) of the Constitution Act, 1982, is a cornerstone of the Constitution of Canada which includes The Charter, since it declares that, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force and effect".

Section 52(1) clearly affirms the more general displacement of parliamentary sovereignty by judicial supremacy as it relates to constitutional matters, which now includes the application of The Charter. It is likely and evident from already decided cases that Canadian courts will now take a somewhat bolder approach to striking down offending legislation than they have with the Canadian Bill of Rights since Charter rights are entrenched and apply to both Federal and Provincial governments, whereas rights protected within the Canadian Bill of Rights are not entrenched and apply only federally.

Section 32(1) provides that The Charter applies to the Parliament and government of Canada and to the legislature and government of each province "in respect of all matters within their authority". The Charter was not intended to apply to private persons, either natural or corporate, in their private relationships. It applies only to governments and laws that limit the rights of individuals on the basis that the underlying purpose of The Charter is to limit governmental abuse of power rather than private conduct. Non-Charter remedies are, however, available to individuals under The Newfoundland Human Rights Code in private relationships such as non-governmental employer-employee relationships, and private accommodation and services. In this regard the Government recently introduced an amendment to The Newfoundland Human Rights Code that included mental disability as a prohibited basis of discrimination under the Code. This amendment passed by the Legislature brings the Code more closely in line with The Charter.

The Review Process

This Report is the outcome of a lengthy review of legislation of this province conducted with a view to ensuring that it complies with The Charter. The scope of the review was wide-ranging.

As in other provinces, the evaluation of the legislative provisions that were identified as raising charter-related issues was a difficult process and required the balancing of competing factors; the likelihood that a provision on its face would violate The Charter against the value of the policies embodied in the provision.

Laws which apparently violated some rights protected by The Charter were divided roughly into three categories: the first includes legislation where the appa ent violation is clearly justifiable; the second includes legislation where it is arguable that the apparent violation is justifiable; and the third includes legislation where it is quite clear that the apparent violation cannot be justified. The provisions analyzed in this Report fell, for the most part, into the last category.

This Report also encompasses a fourth category, in a sense completely unrelated to The Charter. The report recommends a list of statutes to be repealed that in some cases contain Charter violations, but another compelling reason for recommending their repeal is that they have no relevancy for the province in 1984. Furthermore, a number of statutes are presently in the process of being rewritten in their entirety. These statutes will be reviewed for possible

Charter violations before they are presented for enactment by the Provincial Legislature. A reference to these statutes is included in this Report.

The balancing procedure outlined above flows from the very structure of The Charter. The rights laid out in The Charter are not absolute. Section 1 of The Charter provides:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

It is quite clear from the cases that have been decided under The Charter that section 1 requires the government, or those seeking to uphold a law which on its face appears to infringe or deny a Charter right, to bring enough evidence to convince the court that the infringement or denial is justified in the circumstances.

From the following two examples of provincial legislative provisions, it is clear how a provision, that on its face appears to be contrary to The Charter, may be justified and is therefore not unconstitutional.

1. Section 3 of The Charter gives every citizen of Canada the right to vote in provincial elections. Section 3 of The Election Act of this province, however, puts several limitations on what appears in the Charter to be an unqualified right to vote. A voter in a provincial election in our province must be 19 years old, have resided in the province for twelve months prior to election day, and reside in the electoral district on the day of the election. Restrictions of this nature on the right to vote appear justifiable.

2. Section 15 of The Charter provides that every individual is equal before and under the law without discrimination on the basis of age. Yet The Highway Traffic Act prohibits driving where a person is under the age of 17. Some limitation based on age is clearly justifiable. The age of 17 is constitutional as long as the choice of that age is, as it appears to be, reasonable.

These laws and others like them are provisions which on their face might appear to violate The Charter, but which can be justified according to the criteria set out in section 1 of The Charter.

Limitations

This review does not address provincial regulations or other subordinate legislation. The Constitution requires that all subordinate legislation comply with The Charter and a review similar to the review of statutes is ongoing.

In the review of the existing legislation it was determined that many of our Acts discriminate on a sexual basis by presuming that positions were filled by males. Some of these violations we are recommending be dealt with immediately. These include provisions that refer specifically to sexist nouns such as "husbands", "women", "men", when in the context of the legislation there is no reason for the sexist term. For example, section 16(2) of the Memorial University (Pensions) Act provides that when the President dies, the Board shall award his "widow" an allowance. This section presumes that the President of Memorial University is a male.

As well, however, in the vast majority of our acts the use of the pronoun "he" is the pronoun used predominantly, when in the context there could be substituted a noun with no sexist reference.

Since our acts contain so many of these apparent violations, it is the Government's policy to correct these violations as legislation is amended from time to time and to ensure that all new legislation avoids, in as far as is possible, these violations. From a strict legal point of view there is no problem since section 23(g) of The Interpretation Act provides the following:

> "(g) words importing the masculine gender include the feminine gender and words importing the feminine gender include the masculine gender and words importing either gender may include corporations and other words of neuter gender;"

As well, in 1979 the Legislature passed an Act entitled The Human Rights Anti-Discrimination Act, 1979 which eliminated a large number of discriminatory references in our legislation.

Construction of Report

As mentioned, the basis of this Report is the review of all provincial legislation. The Report is constructed by dividing the results of the review among the main categories of violations against The Charter. The headings of the Report are as follows:-

Introduction of Report.

Section 15 Violations - General

Mandatory Retirement and The Charter.

Section 15 Violations - Mental and Physical Disabilities.

Section 11(d) Violations - Reverse Onus Provisions.

Section 8 Violations - Search and Seizure.

Section 2 Violations - Fundamental Freedoms.

Section 3 Violations - Right to Vote

Legislation containing violations but which are being re-written and will be reviewed for violations.

Legislation which may contain violations but which the Committee is recommending be repealed.

The Purpose of this Report

This Report is the product of the review process outlined above. Its purpose is to provide the people of the province an opportunity to comment on the proposals and to participate in the process of reforming our laws to comply with The Charter.

In the following pages, the laws which the Review Committee felt violated The Charter are listed and described. The specific sections which appear to contravene The Charter are identified, the reason for each perceived contravention is explained, and a proposed remedy or set of alternative remedies is outlined.

1. SECTION 15 - EQUALITY RIGHTS

Section 15 of The Charter reads as follows:

> "15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

When an individual believes that a law, its administration or impact denies that person equality, after April 17, 1985 the law will be able to be challenged under section 15 of The Charter. As a result of that section there appear to be several instances in provincial statutes where the equality rights guaranteed under that section may be violated.

Section 15 provides that people are equal before and under the law and have the right to the equal protection and equal benefit of the law. In particular, discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age and mental or physical disability will be

prohibited. Affirmative action provisions will not be precluded by section 15.

Discrimination on the basis of sex, age or mental or physical disability are the more prevalent kinds of discrimination in provincial legislation. Again, in a strict legal sense, many of the apparent violations of section 15 of The Charter and met by virtue of section 23 of The Interpretation Act which provides in subsection (g) that:

> "words importing the masculine gender include the feminine gender and words importing the feminine gender include the masculine gender and words importing either gender may include corporations and other words of neuter gender".

The following are specific provisions which appear to violate section 15 of The Charter:

THE CITY OF ST. JOHN'S ACT:

The proviso in section 25 should, in the opinion of the Review Committee, be repealed. It provides that a person convicted of a felony shall be forever ineligible for re-election to the City Council. This would appear to be contrary to section 15 and not demonstrably justified in today's society.

THE CIVIL SERVICE ACT:

Section 3 is recommended to be repealed. The section provides that where a person is unable to obtain a medical certificate of good health, that person may not have the benefit of regulations relating to sick leave but terms relating to sick leave for that person would be those as agreed to by the Minister of Finance. In the opinion of the Review Committee, there seems little justification for the discrimination.

Section 48 is also recommended to be repealed. The section requires the forfeiture of a pension of any person who is convicted of a felony or misdemeanor if that person has been sentenced to a term of imprisonment. This discriminatory provision would, in the opinion of the Review Committee, not be justifiable under section 1 of The Charter, and as it is contrary to section 15 of The Charter, it is recommended to be repealed.

THE COMMISSIONERS OF OATHS ACT:

Section 2(1) allows for the appointment of only British subjects as Commissioners of Oaths in the Province. This restriction would appear to be contrary to section 15 of The Charter and we would recommend the repeal of the reference to British subjects.

THE FOREST FIRES ACT:

Section 15(3) refers only to men and should be amended by changing the word "men" to "person". This subsection appears to be discriminatory on the basis of sex and may, by a straight forward amendment, be improved.

Section 10 allows the ordering of so many men between the ages of eighteen and fifty years to assist in the extinguishment of forest fires. It should be amended by removing the reference to "so many men between the ages of eighteen and fifty years" and replacing the reference with "such persons as may be necessary in the circumstances who are ...". Without such an amendment, it could be argued that the section is discriminatory and contrary to section 15 of The Charter.

THE INDUSTRIAL ACCIDENTS ENQUIRIES ACT:

This is an Act respecting notice of and enquiry into accidents occurring in specified employments and industries. The Act provides that the Attorney General may extend the Act to apply to other employments in which twenty persons or more, not being domestic servants, are employed by the same employer.

Section 3(2) would appear to offend section 15 of The Charter with its discriminatory reference to domestic servants. We would recommend that that reference be repealed and because several of the provisions of the Act appear to be outdated, the entire Act should be reconsidered.

THE INTESTATE SUCCESSION ACT:

Section 16 should be repealed as it discriminates against illegitimate children. Our later comments in relation to the reference to illegitimate children relate to this.

THE LABOUR STANDARDS ACT:

Part VI relates to maternity leave. Section 38(b) of that Part defines "female employee" as excluding domestic servants in any premises where board or lodging for less than three persons is provided for remuneration. Those excluded female employees are discriminated against as they do not receive the benefits provided in Part VI of the Act. It is the opinion of the Review Committee that section 38(b) offends section 15 of The Charter and an amendment to remove that discrimination is recommended.

THE LAND DEVELOPMENT ACT:

Section 26 refers to a "widow". It should be amended so that the reference to "widow" is changed to "surviving spouse".

THE LIMITATION OF ACTIONS (REALTY) ACT:

Section 2 should be amended to change the reference in the section from "husband" to "spouse".

THE LIQUOR CONTROL ACT:

Section 87(2) refers to "the occupier, his wife ...". This assumes the occupier is the husband, and the Review Committee would recommend the section be changed to read "the occupier, the spouse of the occupier ...".

Section 120 is recommended to be amended. The section presumes the act of a wife, child or servant is that of the husband and it presumes the occupier of the premises is a male. This provision should be amended to remove the discriminatory tone.

THE MEMORIAL UNIVERSITY (PENSIONS) ACT:

Sections 16(2), 21(1) and 24 should be amended so that the reference to "widow", wherever it occurs, should be changed to "surviving spouse".

THE MEMBERS OF THE HOUSE OF ASSEMBLY (RETIRING ALLOWANCES) ACT:

Sections 10(4), 12(3) and (4), 21(4) and 23 relate to pensions payable under the Act. In most pension legislation, pensions are payable to children of the deceased pensioner to the age of eighteen. These provisions provide payment until the age of majority, and this is inconsistent with other pension legislation. As some cut-off age in relation to children is justifiable under Section 1 of The Charter, it is recommended that that age be consistent in all provincial pension legislation and that age be eighteen. It is recommended these provisions be amended accordingly.

Section 11 of the same Act provides that no pension allowance is allowed to the surviving spouse where the member of the House of Assembly dies before the first anniversary of the marriage and there was at the time of marriage an expectation that the member would not survive until that first anniversary. This provision appears to discriminate against certain spouses with no reasonable justification, and as there is no similar provision in other pension legislation, we would recommend its repeal.

THE NOTARIES PUBLIC ACT:

Section 2(1) allows for the appointment of only British subjects as Notaries Public in the Province. This restriction would appear to be contrary to section 15 of The Charter and we would recommend the repeal of the reference to British subjects.

THE REGISTRATION (VITAL STATISTICS) ACT:

Section 12 deals with the registration of birth of an illegitimate child. This section should be changed in light of our later comments on illegitimate children.

Section 26(1) of the Act allows clergymen, doctors, solicitors, members of the Legislature and public officers to have reference to the registers of the Registry at no charge. Any other person has to pay the prescribed fee for such reference. It would be our recommendation that this discrimination be removed by repealing the subsection.

THE ROYAL NEWFOUNDLAND CONSTABULARY ACT:

Section 2(c) should be amended to change, in the definition of member, the word "man" to "person".

THE SOCIAL ASSISTANCE ACT:

Section 2(r) defines widow. There is no equivalent definition of widower. In the context of the Act, the word "widow" is used only in section 6, and the Review Committee recommends the removal of the discriminatory reference to widow and recommends the substitution of the term "surviving spouse". In addition to the revision of the discriminatory term in section 6, it is recommended that the whole section be rewritten on the basis of single parent so that the existing discrimination between fathers and mothers would be removed.

THE SOLEMNIZATION OF MARRIAGE ACT:

Section 19 of this Act requires written consent before a licence is issued where either party to an intended marriage is under nineteen years. It is the opinion of the Review Committee that the reference to nineteen years of age is justifiable under section 1 of The Charter. However, the section further provides whose consent is required where the parents of the party are not both residing together. It is these further provisions that are recommended to be revised as they are contrary to section 15 of The Charter. As they presently read, the consent of the father of the party is required except in particular enumerated situations. If the father of the party is dead or is covered by one of the

particular enumerated situations, only then is the mother's consent required. The Review Committee recommends that consent should be tied only to custody and that the present provisions be repealed and replaced by a provision that the consent of the parent having custody be required.

The reference to an illegitimate child would also be recommended for repeal. Comments under a later heading will deal with the issue of references to illegitimate children.

2. MANDATORY RETIREMENT AND THE CHARTER

Section 15 of The Charter provides that there shall be no discrimination on the basis of age. This language seems to call into question the use of age as a reason for terminating a person's job.

Provincial legislation and regulations which provide for compulsory retirement may be challenged under section 15.

Section 1 of The Charter states that The Charter

> "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

It can be argued that compulsory retirement can be "demonstrably justified" under section 1. As a result, it is not recommended that provincial legislation pertaining to compulsory retirement be changed at this time. However, the courts will decide, eventually, whether or not compulsory retirement is contrary to section 15 and will interpret compulsory retirement in light of section 1 and section 15 of The Charter.

3. SECTION 15 - MENTAL OR PHYSICAL DISABILITY

Discrimination on the basis of mental or physical disability is one of the most common reasons for which provisions of provincial legislation is found to be contrary to section 15 of The Charter. In some instances, the particular provisions noted in the following examples are not strictly offensive to The Charter; however, redrafting of the provisions can achieve legislative policy which is non-discriminatory in its effect while avoiding the derogatory use of such phrases as 'mental disability'.

THE CITY OF CORNER BROOK ACT:

Section 14(1)(e) provides that a candidate is not qualified to be elected if he is mentally incapacitated. The Committee recommends deletion of this paragraph.

THE DEFERRED PENSIONS ACT:

Section 3(1)(b) provides for mandatory retirement where a teacher "is unable to perform his duties efficiently owing to mental or physical incapacity which is medically certified to the satisfaction of the Minister that is likely to be permanent". The Committee recommends the provision be changed to refer to the situation where a teacher "is unable to perform his duties efficiently and that inability is to the satisfaction of the Minister shown to be likely to be permanent".

THE EDUCATION (TEACHERS' PENSION) ACT:

Section 4(1)(b) refers to the situation as in The Deferred Pensions Act, where a person has been compelled to retire because of suffering from a mental or physical incapacity. The Committee has recommended changes to such a provision in The Deferred Pensions Act, and a similar change should be made to paragraph (b).

Section 5(1)(c)(ii) of the Act also has a similar reference to mental or physical incapacity, and the Committee would recommend a similar type of amendment.

THE LAW SOCIETY ACT:

Paragraph 71(1)(b) requires a member to vacate the Law Foundation of Governors if he becomes a mentally disordered person. This reference to "mental or physical disability" should be removed; and if for any reason a member was unable to act, he would, under paragraph 71(1)(e) be required to vacate the Board.

THE MEDICAL ACT:

Section 26 should be repealed because it discriminates unjustifiably against a medical practitioner who is admitted to a hospital for treatment of mental illness or for addiction to drugs or alcohol. This section should be amended to apply to all medical incapacities relating to the ability to function as a medical doctor.

THE OPTOMETRY ACT:

Section 35 should be amended because it discriminates unjustifiably against a person who is admitted to a hospital for treatment of mental illness or for addiction to drugs or alcohol. This section should be amended to apply to all medical incapacities relating to their ability to function as an optometrist.

THE PHARMACEUTICAL ASSOCIATION ACT:

Section 10(2)(d) should also be amended to eliminate a reference to physical or mental incapacity similar to the reference in The Deferred Pensions Act.

THE SOCIAL ASSISTANCE ACT:

Section 2(i) should be amended to delete the reference to physical or mental illness. The word "incapacitated" is able to be defined without such discriminatory references.

THE UNIFORMED SERVICES PENSIONS ACT:

Section 18(1)(b) should be amended to remove a reference to mental or physical incapacity in the same way as section 3(1)(b) of The Deferred Pensions Act.

4. SECTION 11(d) - THE RIGHT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY

Section 11(d) of The Charter ensures that a person who has been charged with an offence cannot be convicted without evidence that convinces an independent and impartial tribunal of the guilt of that person. This section provides the protection against reverse onus situations. Reverse onus clauses are statutory provisions requiring an accused person to prove the absence of a particular element of an offence.

The onus of proof is, in these provisions, on the accused and not, then, on the prosecutor. This section does not provide an absolute protection, however. The courts have indicated that reverse onus clauses should be upheld under The Charter in certain cases. According to the leading case on the issue, R. v. Oakes, reverse onus clauses should be upheld if:

1. the offence is very serious in that it results in grave harm or occurs frequently;
2. it is easy for the accused to prove or disprove the facts; and
3. it would be very difficult for the prosecution to prove the facts.

There are, however, in our provincial statutes several instances where the accused is, in effect, required to disprove the entire offence, instead of only one element or part of it or where, according to the test noted above, the reverse onus clauses should not be upheld. They are as noted in the following statutes:

THE ARCHITECTS ACT:

Section 38 should be repealed because it places the burden on the accused of proving he or she is entitled to practice architecture in the province.

THE COMPANIES ACT:

Section 288 places the onus of proof on the accused under sections 284 to 287 of the Act and such reverse onus would not, in our opinion, be upheld under the guidelines set out in R v. Oakes.

THE FINANCIAL CORPORATION CAPITAL TAX ACT:

Section 53 should be repealed because of the onus it places on the accused. The provision provides that in any prosecution for failure to pay the tax under the Act, the onus of proving the tax was paid in on the accused. The Committee would recommend a prima facie proof provision be substituted in its place. This provision would provide that an affidavit to the effect that the fact that no record of receipt for the tax has been found after a diligent search in the appropriate office is prima facie proof that the tax alleged to be payable was never received. Such a prima facie proof provision would ensure that it is not inordinately difficult for the Crown to prove non-payment.

THE FOREST FIRES ACT:

Section 4 provides that the owner or occupant of the land upon which any fire is made or originates is deemed and taken to be the person starting the fire unless he can show to the satisfaction of the court that the fire was not started by him, nor by any person by his direction or in his employment. This reverse onus provision places the owner or occupant of the land in the position of having to prove the owner or occupant's innocence under circumstances that, at times, could be extremely difficult and sometimes impossible. This section is clearly contrary to section 11(d) of The Charter and should be repealed.

THE HEALTH AND PUBLIC WELFARE ACT:

Part III governs the operation of private hospitals. Under section 29 of the Act, in any prosecution for an offence under Part III, the burden of proving that any person residing in a house and receiving medical treatment is not a patient within the meaning of the Act is upon the person charged. Section 30 is similar to section 29 and both provisions are clearly contrary to section 11(d) of The Charter and should be repealed.

THE HIGHWAY TRAFFIC ACT:

Section 64 provides that anyone charged under the Act or the Criminal Code arising out of the operation of a motor vehicle may be directed by the court to have the licence suspended from the day the charge is laid. The suspension exists until the determination of the charge. The Committee would recommend this section be amended whereby a judge can only suspend a driver's licence prior to trial where there is first a hearing for the purpose of determining whether such a suspension is appropriate.

Section 66(1) allows the Registrar of Motor Vehicles to suspend or cancel a driver's licence for serious violation of the Act or the regulations thereunder or upon being satisfied of the unfitness, physical or otherwise, of a driver or for any other reason which may appear sufficient to the Registrar. This provision gives overly broad powers to the Registrar and should be amended to restrict the Registrar's power to suspend only in cases of serious violation of the Act or unfitness to drive. In addition, the Registrar's power to suspend in this fashion should be subject to the condition that a hearing be held before the Registrar at which time the driver in question could present evidence and be represented by legal counsel.

Section 71 allows the Registrar to suspend a driver's licence of a person committed to trial for an offence. This would appear to be contrary to section 11(d) of The Charter and the section should be amended by deleting "or committed for trial" and "or forfeited for bail".

Section 79 of the Act should be amended. As it presently reads the Registrar may determine if a driver is responsible for an accident and, if so, suspend the licence. This would appear to be tantamount to a conviction in practical terms by the Registrar and so contrary to section 11(d) of The Charter.

Section 79 should be amended as follows:

Section 79(1) - Delete the reference to the magistrate's certificate and the procedure related to in that regard. Delete any reference to the Registrar determining responsibility for an accident. Similarly, the Registrar should not have the power to require that security be set up regarding a possible judgment. Subsection (1) should merely enable the Registrar to suspend a driver's licence and vehicle licence when he is notified of an

uninsured motor vehicle being involved in an accident.

Section 79(2) - Repeal paragraph (b).

Section 79(3) - Repeal.

Section 79(4) - Delete the words "and in any other forms mentioned in sections 81 and 82". The reference in 79(4) to the amount of coverage should be to section 20 of The Automobile Insurance Act. Paragraphs (a) and (b) should be deleted. There should, however, be some provision authorizing the Registrar to re-instate a licence upon proof of insurance.

Section 79(4A)- Repeal.

THE INSURANCE COMPANIES ACT:

Section 85(3) should be repealed because of the onus it places on the accused to show that the accused was licensed.

THE INSURANCE COMPANIES TAX ACT:

Section 32(1) is similar to section 53 of The Financial Corporations Capital Tax Act and we recommend its repeal, and replaced with a prima facie proof provision.

Sections 26(4) and 32 of the Act are similar to section 43 of The Retail Sales Tax Act that we discussed earlier. We would recommend these sections be repealed and replaced with a prima facie proof provision.

THE INSURANCE PREMIUMS TAX ACT:

Section 10 should be repealed because of the onus it places on the accused. The provision provides that in any prosecution for failure to pay the tax under the Act, the onus of proving the tax was paid is on the accused. It is similar to section 53 of The Financial Corporation Capital Tax Act and we would recommend its repeal and replacement with a prima facie proof provision similar to the one recommended for The Financial Corporation Capital Tax Act.

THE PHARMACEUTICAL ASSOCIATION ACT:

Section 36(1) should be repealed because of the onus it places on the accused to prove that he is entitled to operate an establishment under the Act, prepare drugs and to assume the title of pharmacist.

THE RETAIL SALES TAX ACT, 1978;

Section 43 provides that a notice sent to a taxpayer, on proof of being mailed or served, is proof that the amount stated in the notice is owing by the taxpayer and the onus of proving otherwise is on the taxpayer.

Section 52 of the Act puts the onus of proving that the tax was paid on the accused. The result of this is that the accused must disprove the entire offence of failing to pay the tax as required by law.

The Committee would recommend that these two sections be repealed and that in place of sections 43 and 52 a prima facie proof provision be substituted in each case. Such a prima facie proof provision has been referred to in relation to The Financial Corporation Capital Tax Act.

THE TOBACCO TAX ACT:

Sections 27 and 34(3) and (4) should be repealed to be consistent with our comments on The Retail Sales Tax Act and a prima facie proof provisions should also be included in the Act.

5. SECTION 8 - UNREASONABLE SEARCH AND SEIZURE

Section 8 of The Charter provides simply as follows:

"Everyone has the right to be secure against unreasonable search or seizure."

The Supreme Court of Canada has now pronounced on section 8 of The Charter in the Southam Inc. case. The Court decided that the purpose of section 8 requires that unjustified searches be prevented. It is not enough that a determination be made, after the fact, that the search should not have been conducted.

Prior authorization, where feasible, is a precondition for a valid search and seizure. It follows that warrantless searches are prima facie unreasonable under section 8.

The Court in the Southam Inc. case states that for prior authorization to be meaningful two things are necessary; first, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person need not be a judge, the person must nevertheless, at a minimum, be capable of acting judicially. Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard

consistent with section 8 of The Charter for authorizing searches and seizure.

In certain circumstances warrantless searches may be reasonable. A warrantless search where it is not practicable to obtain a warrant may be entirely justifiable. Further, a warrantless search of a vehicle, vessel or aircraft, which may move quickly away, may be reasonable where an offence is being committed, as where, for example, it contains illegal drugs or alcohol.

Warrantless searches require justification in order to meet the constitutional standard of reasonableness secured by section 8 of The Charter, and statutory provisions authorizing such warrantless searches are subject to challenge.

It is therefore recommended that all our provincial statutes authorizing searches and seizures be carefully reviewed and changed in light of the foregoing comments.

For the purpose of this report, the search and seizure provisions have been separated into three categories as follows:

Category I

Section	Act
21(2)	Automotive Dealers Act
23(3) and (4)	Automotive Dealers Act
9	Collection Agencies Act
13	Communicable Diseases Act
118	Companies Act
7(2)	Consumer Reporting Agencies
6	Degree Granting Act
6	Emergency Compensation for Employees Act
41 to 43	Gasoline Tax Act
25	Health and Public Welfare Act
23	Insurance Premiums Tax Act
60(1)	Labour Standards Act
21(2)	Liquor Control Act
14(1) and (2)	Mobile Home Dealers Act
7(1) and (2)	Mortgage Brokers Act
7(1) and (2)	Newfoundland Consumers Protection Act
17(2)	Newfoundland Human Rights Code
7(2)	Pensions Benefits Act
7	Plant Protection Act
29	Real Estate Trading Act

38 and 39	Retail Sales Tax Act
9	Salt Fish Marketing Act
8	Shops Closing Act
9	Trade Practices Act

Category II

Section	Act
18	Day Care and Homemaker Services Act
33(d)	Financial Corporation Tax Act
40(d)	Income Tax Act
10	Welfare Institutions Licencing Act

Category III

Section	Act
13(1) and (2)	Dangerous Goods Transportation Act
93	Liquor Control Act
9 and 10	Poultry and Poultry Products Act
14(2)	Salvage Dealers Licensing Act
36, 37 and 38	Tobacco Tax Act
5	Vegetable Grading Act
10	Wildlife Act

The first category of search and seizure provisions refer generally to two provisions. One relates to powers of

inspectors or investigators to enter on premises and to determine if the provisions of the Act are being complied with, to inspect books and records, and to ascertain other administration-related issues. The second provision relates to searches that will possibly result in evidence in a prosecution under the Act. An example of a statute in this category is The Retail Sales Tax Act, 1978 and sections 38 and 39 of that Act are the specific provisions to which we refer.

It is recommended by the Review Committee that the provisions relating to search and seizure identified in Category I be repealed and replaced, with the necessary changes, with the two provisions outlined below. The provisions have been drafted with The Retail Sales Tax Act, 1978 in mind but the wording may be adapted to be appropriate to the various Acts in Category I.

It is recommended that in place of present provisions authorizing searches investigating compliance of the provisions of the respective Acts or authorizing searches for other purposes be repealed and replaced, where appropriate and with the necessary changes, with the following two provisions:

"1. Any person appointed or designated under this Act (called an inspector) may from time to time and at all reasonable times, enter upon the business premises of any person or upon the premises where that person's records are kept

(a) to inspect, audit or examine books of account, records or documents; or

(b) to ascertain the quantities of tangible personal property purchased, on hand, sold, consumed or used by that person, and whether the taxes collected or payable by that person have been remitted or paid to the Minister; and the persons occupying or in charge of such premises shall answer all questions pertaining to those matters and shall produce for inspection such books of account, records, or documents as the inspector may request.

2. (1) Any Provincial Court judge or Justice of the Peace who is satisfied by information upon oath that there is reasonable and probable grounds for believing that any person has in his possession any tangible personal property in respect of the consumption or use of which the tax payable has not been paid may at any time issue a warrant under his hand authorizing an inspector named in the warrant

(a) to enter and search any premises, receptable or motor vehicle, or any ship or boat in the province where any such tangible personal property is believed to be situated, and

(b) to make such inquiries as are deemed necessary.

(2) The person occupying or in charge of the premises, receptacle or motor vehicle, ship or boat described in subsection (1), shall produce, for inspection by the inspector named in the warrant, any tangible personal property in his possession, and answer any questions relating thereto.

(3) The inspector may, in the course of searching any premises, receptacle, motor vehicle, ship or boat pursuant to a warrant issued under subsection (1)

(a) make copies or abstracts of any books or records relating to the tangible personal property that is the subject of his search; or

(b) take away any such books or records for the purpose of making copies thereof, which books and records shall be returned forthwith after copies are made.

The second category of search and seizure provisions are not as extensive as those in Category I. In relation to the statutes included in Category II it is recommended that only the second provision as noted in the draft form above be substituted for the indicated sections of Category II statutes. Again, of course, the wording will have to be adapted to be appropriate in each individual statute.

The statutes noted in Category III are recommended to be amended by substituting for the noted provisions the two provisions as noted in the draft form above. In addition to that revision, these Category III statutes also require a provision relating to the search of moving vehicles, vessels or aircraft in situations where it is not reasonable in the circumstances to delay the search until a warrant may be obtained. It is possible that federal statutory provisions

may be soon introduced relating to telewarrants and perhaps this mechanism will solve the problem in this area. If such provisions do materialize in the near future, they will be adopted by reference into our provincial Summary Procedings Act.

In addition to the above-noted provincial provisions relating to search and seizure, there are a couple of further points to be noted.

THE LIQUOR CONTROL ACT

Sections 95 to 97 relate to search and seizure and the Review Committee would recommend their repeal as they appear to be contrary to the Southam Inc. case noted above.

THE MOTOR CARRIER ACT

In section 34(4) there is presently a provision relating to stopping and examining a vehicle. The problem noted immediately above applies to this provision of The Motor Carrier Act insofar as there is a problem of obtaining a warrant before a vehicle may move away and evade a search.

6. SECTION 2 - FUNDAMENTAL FREEDOMS

Section 2 of The Charter reads as follows

"2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

THE LEGAL AID ACT:

Section 66(1) and (2) provides that solicitors employed full time by the Legal Aid Commission shall devote themselves exclusively to the exercise of their functions for the Commission, except in exceptional circumstances and in accordance with the regulations, and further, that "under pain of dismissal" they shall not offer themselves as candidates in any election or "engage in partisan activities in favour of a candidate or a political party". It is likely that these provisions violate section 2 of The Charter and should be repealed.

THE UNIFIED FAMILY COURT ACT:

Section 15 allows the proceedings in the Unified Family Court to be held in camera. This section may be found to be contrary to section 2 of The Charter and we would recommend that the section be redrafted along the lines of section 39 of The Young Offenders Act which establishes two sets of

criteria for exclusion. The judge is empowered to order exclusion to protect a young person from serious prejudice or harm; as well, the judge may make an order for exclusion in the interests of public morals, the maintenance of order, or the proper administration of justice.

7. SECTION 3 - RIGHT TO VOTE

Section 3 of The Charter provides as follows:

> "3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

THE ELECTION ACT

Section 4(d) disqualifies from voting "every person held in custody under warrant of commitment in any penitentiary or gaol". This means that persons being held pending trial are deprived of their right to vote as guaranteed under section 3 of The Charter.

Section 4(d) contravenes section 3 of The Charter as well as section 15 of The Charter and it is recommended that section 4(d) be repealed since, in the opinion of the Review Committee, it cannot be "demonstrably justified in a free and democratic society" under section 1 of The Charter.

Furthermore, since pre-trial detainees are forcibly restrained from attending the polls, the Government is obliged, as a matter of constitutional requirement, to provide some form of absentee voting for pre-trial detainees.

The issue of a person's right to vote while serving a prison term is presently before the Supreme Court of Canada.

THE MUNICIPALITIES ACT:

Paragraph (b) of subsection (2) of section 527 is worded very similarly to section 4 of The Election Act, and the Review Committee would recommend a repeal of that section 527(2)(b) as well.

8. LEGISLATION CONTAINING VIOLATIONS BUT THE WHOLE OF WHICH IS BEING ACTIVELY CONSIDERED IN A REDRAFTING PROCESS.

The Mental Health Act of the Province has not been included in the considerations of the Review Committee because the Act has been under study by a Committee. It is the understanding of the Review Committee that the committee has made a report to Government that recommends a large number of changes to the present Act and recommends the

introduction of a new Act. That new Act would, of course, be drafted in light of The Charter.

An area of legislation that the Review Committee did not consider is the social service legislation relating to children. Another committee is presently reviewing The Adoption of Children Act, The Child Welfare Act, The Children of Unmarried Parents Act and The Legitimacy Act. In addition to those Acts, although they don't relate only to children, The Midwifery Act and The Change of Name Act are under consideration.

It appears to the Review Committee that a review of these Acts is necessary, especially in light of The Charter. Many of the concepts behind the Acts should be questioned as a result of The Charter, in particular section 15.

An example of one of these concepts is that of illegitimate children. It is the opinion of the Review Committee that such a concept is outdated and that rather than various references throughout provincial statutes to illegitimate children, there should be an Act that gives them equal status with other children.

Consideration by the Review Committee of these Acts at this time would not be as beneficial as a review of the new legislation proposed to replace these Acts because of the recognition that the present Acts are in need of comprehensive review.

9. LEGISLATION THAT MAY CONTAIN VIOLATIONS BUT OF WHICH THE REVIEW COMMITTEE RECOMMENDS REPEAL.

Throughout the review of all provincial statutes, the Review Committee has identified several statutes that would appear to be appropriately repealed. The following Acts are recommended to be repealed:

The Foreign Marriages Act

The Hawkers and Peddlers Act

The Marine Disasters Act

The Nuisances and Municipal Regulations Act

The Poor Debtors Act

The Relief Works Administration Act

Most of these Acts have been found to have outlived their usefulness and to be possibly in violation of The Charter. Not every provision of each of these Acts is contrary to The Charter but, for example, in The Nuisances and Municipal Regulations Act, section 26 relates to "any

common prostitute or night walker or other female on board foreign ships in any port in the province". While this section would appear to be contrary to The Charter, other provisions in the Act that relate to such varied offences as the playing of games on Sunday, mummering as a nuisance and the requirement that owners of carts and wagons have their names painted on the cart or wagon in a conspicuous place may not be so contrary to The Charter as they are outdated and replaced by general municipal legislation.

However, if the recommendation of the Review Committee is accepted that The Nuisances and Municipal Regulations Act be repealed, then consideration should be given to retaining section 33 of the Act which provides access by peace officers to private dwellings in certain circumstances.

Respectfully Submitted:

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January, 1985